No. 91-1010

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

PUERTO RICO AQUEDUCT AND SEWER AUTHORITY,
Petitioner,

v.

METCALF & EDDY, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONER

AMICI CURIAE, THE STATES OF OHIO, ALABAMA, ARIZONA, ARKANSAS, CALIFORNIA, CONNECTICUT, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, MAINE, MICHIGAN, MISSISSIPPI, MISSOURI, MONTANA, NEVADA, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OKLAHOMA, OREGON, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, WASHINGTON, WEST VIRGINIA, WISCONSIN, WYOMING, THE COMMONWEALTHS OF KENTUCKY, MASSACHUSETTS, NORTHERN MARIANA ISLANDS, PENNSYLVANIA, PUERTO RICO, VIRGINIA, AND THE TERRITORY OF GUAM.

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INTEREST OF THE AMICI CURIAE

The State of Ohio, joined by the states and commonwealths identified above, submits this brief *amici curiae* in support of the petitioner, urging this Court to reverse the holding of the court below. The First Circuit's holding that interlocutory orders disposing of Eleventh Amendment

claims are not immediately appealable under the collateral order doctrine denies states and their agencies immunity from suit in federal court. The states and commonwealths are interested in this Court reaffirming that the Eleventh Amendment immunity is an immunity from trial and addressing the conflict between the First Circuit and six other circuit courts that have held that an immediate appeal is available when a state's assertion of Eleventh Amendment immunity is rejected by a district court. Thus, the states have a significant interest in the practical consequences of the First Circuit's decision which renders the Eleventh Amendment meaningless and results in unrecoverable litigation expenses if the states must go through a trial only to have established on appeal after trial that the states have immunity from lawsuits in federal court.

STATEMENT OF THE CASE

The facts set forth herein are taken from the First Circuit's decision below. *Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct & Sewer Authority*, 945 F.2d 10 (1st Cir. 1991). The Puerto Rico Aqueduct and Sewer Authority (PRASA) was established by the Puerto Rico legislature as "a public corporation and an autonomous government instrumentality" to provide drinking water and sanitary sewage service to the inhabitants of Puerto Rico. 22 L.P.R.A. §§ 142, 144 (1987).

In 1986, PRASA entered into a contract with Metcalf & Eddy, Inc. (Metcalf), an engineering firm, to provide extensive services to bring eighty-three of PRASA's facilities into compliance with federal "clean water" standards. Later, Metcalf and PRASA had contract disputes and in 1990 Metcalf filed a diversity action against PRASA in the United States District Court for the District of Puerto Rico for a declaration of the parties' contractual rights and for $52,000,000 in damages for breach of contract.

PRASA filed in the district court a motion to dismiss based on immunity from suit under the Eleventh Amendment to the United States Constitution. The district court denied the motion to dismiss and ordered PRASA to answer the

complaint. PRASA took an immediate appeal to the First Circuit and requested a stay of the district court proceedings. The First Circuit denied th stay and later dismissed PRASA's appeal for want of federal jurisdiction under 28 U.S.C. § 1291. *Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct & Sewer Authority*, 945 F.2d 10 (1st Cir. 1991). Relying upon its earlier decision in *Libby v. Marshall*, 833 F.2d 402 (1st Cir. 1987), the First Circuit held that the denial of a state's Eleventh Amendment claim of immunity from suit does not confer a right to an immediate appeal. The First Circuit acknowledged that four other circuit courts of appeals have held otherwise.

SUMMARY OF ARGUMENT

The First Circuit erred in not following a line of Supreme Court cases which lead to the inescapable conclusion that a district court's denial of a state's motion to dismiss premised on Eleventh Amendment grounds is an immediately appealable final collateral order. "[T]his Court has consistently held that an unconsenting state is immune from suits brought in federal courts by her own citizens as well as by citizens of another state." *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974) (citations omitted). This immunity is a barrier to suit, not simply a bar to liability after trial. The state's Eleventh Amendment immunity from suit is lost if the district court's interlocutory order denying a motion to dismiss based on the Eleventh Amendment is not immediately reviewable as a final collateral order.

This case fully meets the elements set forth in *Cohen v. Beneficial Industrial Loan Commission*, 337 U.S. 541 (1979), for the application of the final collateral order doctrine. Unlike the First Circuit, six circuit courts have found that the *Cohen* doctrine applies to Eleventh Amendment jurisprudence. The reasoning in *Libby v. Marshall*, 833 F.2d 402 (1st Cir. 1987), which the First Circuit relied upon below, is flawed.

For purposes of the *Cohen* doctrine the state's Eleventh Amendment immunity is analogous to the absolute and qualified immunities protecting government officers. These immunities shield the state and its officials with an entitlement not to stand trial. Thus, a state's interest in not being haled

into federal court cannot "be adequately vindicated upon appeal from a final judgment" as the First Circuit concluded.

ARGUMENT

I. A DENIAL OF A MOTION TO DISMISS ASSERTING ELEVENTH AMENDMENT IMMUNITY IS AN IMMEDIATELY APPEALABLE FINAL COLLATERAL ORDER SUBJECT TO THIS COURT'S DECISION IN *COHEN V. BENEFICIAL INDUSTRIAL LOAN COMMISSION*.

The First Circuit ruled that a "district court's denial of a [state] government agency's motion to dismiss premised on Eleventh Amendment grounds is not an immediately appealable [collateral] order." *Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct and Sewer Authority*, 945 F.2d 10, 14 (1st Cir. 1991) (footnote omitted). This conclusion was predicated on the lower court's contention that " 'the interests underlying the immunity the Eleventh Amendment provides to the states can be adequately vindicated upon an appeal from a final judgment . . . . ' " *Id.* at 12 (quoting *Libby v. Marshall*, 833 F.2d 402, 407 (1st Cir. 1987)). Both in its conclusion and reasoning, the court below could not have been more mistaken.

Ordinarily, decisions and orders of a district court are not appealable until a "final decision" has been entered. *See* 28 U.S.C. § 1291; *Mitchell v. Forsyth*, 472 U.S. 511, 524 (1985). However, "a decision 'final' within the meaning of § 1291 does not necessarily mean the last order possible to be made in a case." *Mitchell*, 472 U.S. at 524. Thus, the Court has identified a class of decisions "which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Industrial Loan Commission*, 337 U.S. 541, 546 (1979).

Three factors must be present for the *Cohen* doctrine to apply. First and most importantly, "the district court's decision [must be] effectively unreviewable on appeal from a final judgment." *Mitchell v. Forsyth*, 472 U.S. 511 (1985) (plurality opinion). One example of a decision that is effectively unreviewable on appeal from a final judgment is one implicating "a . . . defense to liability . . . [that] encompasses a right not to stand trial under . . . specified circumstances." *Mitchell*, 472 U.S. at 550 (Brennan, J., concurring in part and dissenting in part).

The defense at issue, Eleventh Amendment immunity, "encompasses not merely *whether* [a state] may be sued, but *where* it may be sued." *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 99 (1984) *("Pennhurst II")*, (emphasis in original). Consequently, "this Court consistently has held that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State." *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974).

The concept that the Eleventh Amendment prohibits a state from being sued in federal court is so firmly established even jurists who would limit the circumstances under which the amendment would be applicable recognize it is a barrier to suit, and not merely a barrier to judgment. *See Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 110 S. Ct. 1868, 1875 (1990) (Brennan, J., concurring) ("[T]he Eleventh Amendment secures States only from being haled into federal court . . . where jurisdiction is based on diversity."); *see also Employees v. Missouri Department of Public Health and Welfare*, 411 U.S. 279, 294 (1973) (Marshall, J., concurring in the judgment) ("[B]ecause of the problems of federalism inherent in making one sovereign appear against its will in the courts of the other, a restriction upon the exercise of the federal judicial power has long been considered appropriate under certain circumstances."). Only last year, this Court reiterated in unambiguous terms that "a State *will not be subject to suit in federal court* unless it has consented to suit, either expressly or in the 'plan of the [constitutional] convention.' " *Blatchford v. Native Village of Noatak*, ___

U.S. ___ , 111 S. Ct. 2578, 2581 (1991) (emphasis added). *See also Pennhurst II*, 465 U.S. at 99 ("a State may consent to suit against it in federal court").

Once a state is haled into federal court and forced to stand trial the Eleventh Amendment has been subverted. In light of the Court's frequently expressed view that the Eleventh Amendment incorporates immunity from suit in federal court, the district court's order in this case denying the motion to dismiss based on the Eleventh Amendment comfortably satisfies the first requirement of *Cohen* that the decision in question be unreviewable on appeal from a final judgment.

The second *Cohen* factor mandates that an appealable interlocutory decision must "conclusively determine the disputed question." *Mitchell*, 472 U.S. at 527 (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)). Because the necessary consequence of the trial court's rejection of PRASA's assertion of Eleventh Amendment immunity is for the parties to marshal their forces, engage in fullblown discovery, and proceed to trial; the district court's order "finally and conclusively determine[d PRASA's] claim of right not to *stand trial* [in federal court] on the plaintiff's allegations." *Id.* at 527 (emphasis in original). Thus, the second requirement of *Cohen* is satisfied.

Finally, *Cohen* applies if the issue presented involves a " 'clai[m] of right separable from, and collateral to, rights asserted in the action.' " *Mitchell*, 472 U.S. at 527 (quoting *Cohen*, 337 U.S. at 546). Plainly, "a claim of [Eleventh Amendment immunity] is conceptually distinct from the merits of the plaintiff's claim that his rights have been violated." *Id.* at 527-28.

The preceding analysis is firmly anchored to the language and spirit of this Court's decisions. In addition, every court of appeals to consider the question at hand, with the exception of the First Circuit, has applied the *Cohen* doctrine to Eleventh Amendment jurisprudence. *See Minotti v. Lensink*, 798 F.2d 607, 608 (2d Cir. 1986), *cert. denied*, 482

U.S. 906 (1987); *Dube v. State University*, 900 F.2d 587, 594 (2d Cir. 1990), *cert. denied*, 482 U.S. 906 (1991); *United States v. Yonkers Board of Education*, 893 F.2d 498, 502-03 (2d Cir. 1990); *Eng v. Coughlin*, 858 F.2d 889, 894 (2d Cir. 1988); *Coakley v. Welch*, 877 F.2d 304, 305 (4th Cir. 1989), *cert. denied*, 492 U.S. 976 (1989); *Loya v. Texas Department of Corrections*, 878 F.2d 860, 861 (5th Cir. 1989) (per curiam); *Chrissy F. v. Mississippi Department of Public Welfare*, 925 F.2d 844 (5th Cir. 1991); *Corporate Risk Management Corp. v. Solomon*, Nos. 90-1713, 90-1730, 1991 U.S. App. LEXIS 15001 (6th Cir. July 2, 1991), petition for cert. filed on other grounds sub nom. *Coleman v. Corporate Risk Management Corp.*, 60 U.S.L.W. 3388 (U.S. Nov. 26, 1991) (No. 91-766); *Kroll v. Board of Trustees*, 934 F.2d 904, 906 (7th Cir.), *cert. denied*, 116 L.Ed.2d 329 (1991); and *Schopler v. Bliss*, 903 F.2d 1373 (11th Cir. 1990) (per curiam).

In contrast, the decision of the court below not to apply *Cohen* to questions of Eleventh Amendment immunity is moored only to precedent from its own circuit, *Libby v. Marshall*, 833 F.2d 402 (1st Cir. 1987). *Libby* not only stands alone, but is premised on a major misconstruction of the Constitution.

In *Libby*, the First Circuit concluded that "[t]he damage the Eleventh Amendment seeks to forestall is that of the state's fisc being subjected to a judgment for compensatory relief." *Libby*, 833 F.2d at 406. This interpretation, however, ignores cases such as *Pennhurst II*, in which the Court stated that the Eleventh Amendment prohibits suits against states "regardless of the nature of the relief sought." *Pennhurst II*, 465 U.S. at 100.

The *Libby* court compounded its error of constitutional construction by misapprehending the reasoning underlying the decision in *Ex Parte Young*, 229 U.S. 123 (1908): "[Under] *Ex Parte Young*, a state has 'to stand trial' whenever a *Young* - type case . . . is brought against it." *Libby*, 833 F.2d at 406. Clearly, this statement is inconsistent with the Court's determination that "[a] suit challenging the constitutionality of a state official's action is not one against the State."

Pennhurst II, 465 U.S. at 102; *accord Will v. Michigan Department of State Police*, 491 U.S. 58, 71 n.10 (1989). Indeed, this "fiction" of *Ex Parte Young* was made necessary precisely because of the Eleventh Amendment's barrier against haling states into federal court.

An additional failing in *Libby* was the First Circuit's refusal to analogize, for purposes of the *Cohen* doctrine, Eleventh Amendment immunity to the absolute and qualified immunities enjoyed by government officials. This ignores the fact that one of the principal justifications for applying *Cohen* to cases involving assertions of immunity — that is, the effect litigation has on the delivery of government services — is present in regard to cases involving assertions of Eleventh Amendment immunity. Suits against a state and suits against government officials both result in the "distraction of officials from their governmental duties." *Mitchell*, 472 U.S. at 526. There is little if any difference between the role a public official must play in a suit where he is named in his individual capacity and when he is acting as the representative of the state, but is not otherwise named as a party to the litigation. The demands of litigation will, in either instance, require the official to consult with legal counsel, be available for purposes of discovery, and divert his attention from the daily operation of government. The government's investment of time, therefore, is the same whether an official or the state itself is sued.

More importantly, the failure of the court below to analogize Eleventh Amendment immunity to absolute and qualified immunity was based in large measure on that court's mischaracterization of the interest protected by the Eleventh Amendment. For purposes of the *Cohen* doctrine, any distinctions between Eleventh Amendment immunity on one hand, and absolute or qualified immunity of individual state officials on the other, disappear as soon as it is acknowledged that the Eleventh Amendment imbues the states with an entitlement not to stand trial.

If allowed to stand, the lower court's holding prohibiting an immediate appeal from an order denying a motion to

dismiss predicated on the Eleventh Amendment will produce inconsistent and undesirable results. Quite often, a state and its officials will be named as defendants in a federal lawsuit for monetary relief. It is likely that the officials will assert either absolute or qualified immunity and that the state will assert Eleventh Amendment immunity.

If the assertions of immunity made by the officials and the state are rejected by the district court, then, consistent with earlier opinions of the Court, the officials will be able to take an immediate appeal. The state, however, according to the First Circuit's reasoning in this case, will not be permitted to appeal immediately.

If upon appeal the denial of the officials' motion to dismiss is reversed, they will be dropped from the case. The state, on the other hand, will be forced to endure the burdens of a trial despite the fact that any judgment entered against it will be unenforceable.

In the case at bar, the result compelled by the Court's decisions discussed above and the result reached by the First Circuit are diametrically opposed. The Eleventh Amendment cannot simultaneously provide an immunity from suit and, as the First Circuit obviously believes, be nothing more than "a mere defense to liability." *Mitchell*, 472 U.S. at 426-27. The interest affected by a district court order rejecting an assertion of Eleventh Amendment immunity cannot be "effectively unreviewable on appeal from a final judgment," *Mitchell*, 472 U.S. 526-27, and at the same time be "adequately vindicated upon appeal from a final judgment," as the lower court concluded.

The Constitution embodies not only a compact between a government and its people, but an understanding between sovereigns. At the heart of this understanding lies the Eleventh Amendment, which serves as a "fundamental constitutional balance between the Federal Government and the States." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238 (1985). The decision below upsets this balance and debases the concept of federalism. It must, therefore, be reversed.

CONCLUSION

For the preceding reasons, amici curiae urge this Court to reverse the decision of the Court of Appeals for the First Circuit in *Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct and Sewer Authority*, 945 F.2d 10 (1st Cir. 1991).

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